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HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: C. J. [Signature]

BEFORE A HEARING OFFICER

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA,

George Vice III,
Bar No. 011753,

Respondent,

) Case No. 05-1690 (McAuliffe)

) FINDINGS OF FACT,
) CONCLUSIONS OF LAW, AND
) RECOMMENDATION

PROCEDURAL HISTORY

A probable cause panelist found probable cause and issued an Order of Informal Reprimand and Costs on December 22, 2005. Pursuant to Rule 54(b)(5), Rules of the Arizona Supreme Court, Respondent demanded institution of formal proceedings. A probable cause Order thereafter issued on March 8, 2006.

The State Bar moved in limine to preclude Respondent from introducing evidence of McAuliffe's (the probable cause panelist in the Bernier matter as more fully discussed below) purported conflict of interest and the partiality of other probable cause panelists in this matter on May 4, 2006, and a "Request for Determination of Discovery Dispute" on May 9, 2006, due to the Bar's failure to timely respond to Respondent's discovery requests. Respondent filed a Motion for Summary Judgment on May 18, 2006. After Responses, Replies, and the filing of Supplemental Authorities and related motions, I construed the "Request for Determination of Discovery" as a request for withdrawal of admissions and granted the request. I ordered supplemental responses to the interrogatories, to the extent the responses had not already been supplemented, and denied Respondent's Motion for Reconsideration. I also denied the State's Bar Motion in Limine.

On June 28, 2006, Respondent filed a "Motion for Reconsideration Re Extent of Ruling Permitting State Bar's Withdrawal of Admissions" and I denied that motion.

1 Respondent filed, on July 17, 2006, "Respondent's Motion for Sanctions or Alternative
2 Motion for Other Orders," based, in part, on Respondent's perception of my "misconstrual
3 at the July 13, 2006, status conference of [my] prior order June 27, 2006 (misdated July 11,
4 2006, by the Disciplinary Clerk)." Respondent claimed that I appeared "to be enabling and
5 enlarging a fundamentally unfair course of conduct by the Bar." I denied that motion.

6 After the prolonged and various discovery disputes and motions were determined¹, a
7 hearing was conducted on August 18, 2006.

8 FINDINGS OF FACT

9 1. In 2005, Daniel J. McAuliffe was serving as a Probable Cause Panelist for the State
10 Bar of Arizona. In that capacity, he issued a subpoena in connection with an investigation
11 in State Bar file 04-1194 (Bernier) of the conduct of Respondent.

12 A. McAuliffe is a partner in Snell & Wilmer LLP, who, as probable cause
13 panelist, overruled an attorney-client privilege objection to the subpoena.

14 B. The instant matter, 05-1690, arises out of email communications from
15 Respondent to McAuliffe related to whether or not McAuliffe had a conflict of interest
16 precluding his participation in the State Bar's investigation of 04-1194.

17 C. McAuliffe is the complainant.

18 2. Respondent objected to McAuliffe's participation in the 04-1194 investigation on
19 the grounds that McAuliffe had a conflict of interest based upon the assertion that lawyers
20 at Snell & Wilmer had represented an entity called ALB, LLC, and/or its principals, in the
21 underlying matter.² After Respondent articulated his objections to McAuliffe serving as
22

23 ¹Other matters were also determined.

24 ²Whether or not McAuliffe had a conflict is not relevant to these proceedings. Respondent
25 appears to believe that the claimed conflict entitled him to abuse McAuliffe because he was not
26 entitled to be respected as an officer of a tribunal. I reject that argument. Moreover, Respondent
27 tried to use these proceedings to assert a claim of malpractice against Snell which is even further
28 removed from the issues raised by the complaint. While I allowed Respondent a wide berth to
enable him to present his defense, I find that the proceeding was unnecessarily prolonged by
Respondent's presentation.

1 Probable Cause Panelist, McAuliffe rejected Respondent's contentions. Respondent
2 continued to press his objection:

3 A. By email dated September 16, 2005, 3:33 p.m., Respondent presented
4 his objections to McAuliffe's participation in the Bernier matter to McAuliffe and others.
5 Respondent suggested that McAuliffe's firm, and the bar, "need a little tightening up" in its
6 conflict check procedures.

7 B. McAuliffe responded by email on September 19, 2005, at 10:21 a.m. and
8 explained to Respondent that he had conducted two conflict checks and determined that there
9 was no conflict. McAuliffe questioned Respondent's authority to assert and litigate
10 privileges which may be held by ALB, LLC.

11 C. ALB, LLC's former attorney, who held the subpoenaed documents,
12 responded in an email to McAuliffe and Respondent on September 19, 2005, at 10:55 a.m.,
13 and represented that a lawyer from Snell had stated that he did represent ALB, LLC
14 [apparently, at some time in the past].

15 D. On September 19, 2005, at 5:18 p.m., Respondent sent an email to
16 McAuliffe in which, among other things, he asserted ethical improprieties of two members
17 of the Disciplinary Commission in an apparent reference to a prior disciplinary proceeding
18 involving Respondent.

19 E. By email dated September 20, 2005, at 8:32 a.m., McAuliffe responded to
20 another email from Respondent regarding Respondent's contention that McAuliffe was
21 conflicted, and wrote: "I think any further communications from you would serve no useful
22 purpose."

23 F. Respondent responded in an email of the same date, at 11:47 a.m., and
24 stated: "Then in lieu of dissembling, perhaps you should take some personal responsibility,
25 undo what you did and get off the case. That is the only proper course."

26 G. McAuliffe responded that same date, at 11:54 a.m., and stated: "Maybe you
27 should do the same."

1 H. Respondent replied at 12:42 p.m. of the same day, and continued to argue
2 his point.

3 I. At 12:58 on the same day, McAuliffe responded: "George: Let me be
4 absolutely clear on this point. I do not wish to receive any further communications from you
5 on this matter."

6 J. On September 21, 2005, at 5:18 a.m., Respondent sent another email to
7 McAuliffe and stated: "You should be otherwise clear as well, instead of trying to obfuscate
8 with a phony representational distinction"

9 K. At 7:09 AM on the same day, Respondent sent McAuliffe another email
10 in which Respondent argued his position, criticized the work of McAuliffe's firm and, again,
11 referred to a position McAuliffe had taken in response to Respondent's objections as
12 "phony."

13 L. At 9:35 AM on the same day, McAuliffe sent an email to Respondent
14 saying: "Despite my quite explicit request that you cease communicating with me concerning
15 this matter, you have persisted in an email message campaign...."

16 McAuliffe went on to state that he viewed Respondent's repeated messages "as an
17 attempt to harass a Probable Cause Panelist and improperly obstruct an investigation," and
18 that if Respondent persisted, he would report the conduct to the Discipline Department.

19 M. Respondent sent back an email at 11:56 that day characterizing
20 McAuliffe's observation of an interference with a bar investigation as "absurd." Respondent
21 characterized McAuliffe's participation in the process as "odious." Respondent added: "Do
22 not threaten me under these circumstances." Respondent indicated in the email that "now
23 I will stop communicating with you."

24 N. On September 22, 2005, Respondent copied McAuliffe on an email sent
25 by Respondent to Ariel Worth and others in which Respondent again set out his view of the
26 facts which he believed established McAuliffe's conflict of interest.

27 3. On September 22, 2005, Respondent filed, in the Bernier matter, a "Notice of
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Conflict, Error and Impropriety in the Participation of Daniel J. McAuliffe, Esq.” and copied Bar Counsel and McAuliffe, among others.

4. McAuliffe filed, in the Bernier matter, a “Statement of Probable Cause Panelist Re Notice of Conflict, Error and Impropriety and Order Vacating Portion of Prior Order,” and copied Bar Counsel and Respondent, among others. In that filing, McAuliffe wrote that Respondent had “deluged [him] with communications. . .” about his purported conflict.

5. On September 27, 2005, Respondent filed “Respondent’s Statement Re Probable Cause Panelist Daniel J. McAuliffe’s Statement of September 23, 2005,” and copied bar counsel and McAuliffe, among others, in which he asserted that McAuliffe’s conflict check was inadequate.

CONCLUSIONS OF LAW

1. Respondent violated ER 3.5(d) by engaging in conduct likely to disrupt a tribunal.

2. Respondent violated ER 8.4(d) by engaging in conduct that was prejudicial to the administration of justice.

AGGRAVATING AND MITIGATING FACTORS

The following aggravating factors are present in this case: prior disciplinary offenses³; refusal to acknowledge wrongful nature of conduct; and substantial experience in the practice of law. Respondent has been disciplined on three prior occasions and he is currently suspended. Respondent continues to maintain that because he was right and McAuliffe was wrong, in his view, Respondent was entitled to act as he did.

³Respondent was suspended for six months and one day in Nos. 97-0907, 97-2352, and 98-1218, effective on October 11, 2001, for multiple violations. In 00-0170, the Respondent was independently suspended for six months with one year of probation (MAP) to follow. While suspended, Respondent was censured on December 23, 2003, for activities occurring while suspended, in No. 01-2329. On April 26, 2004, in 00-1070, Respondent’s period of suspension was increased to one year, effective March 28, 2002, and, as a condition of reinstatement, Respondent was required to demonstrate compliance with the MAP/Probation contract signed and executed by him on June 17, 2003. The increase in suspension was ordered as a result of Respondent’s failure to comply with the MAP contract and, therefore, the judgment.

1 The following mitigating factor is present in this case: absence of a dishonest or
2 selfish motive.

3 DISCUSSION OF APPROPRIATE SANCTION

4 Lawyer discipline is imposed not to punish the lawyer but to protect the public and
5 deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993).
6 It is important to instill public confidence in the bar's integrity. *Matter of Horwitz*, 180 Ariz.
7 20, 29, 881 P.2d 352, 261 (1994). To determine the appropriate sanction, the facts of the
8 case, the A.B.A. Standards, and the proportionality of discipline imposed in analogous cases
9 should be considered. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
10 The A.B.A. Standards require that the following criteria be considered: (a) the duty violated;
11 (b) the lawyer's mental state; (c) actual or potential injury; and (d) aggravating and mitigating
12 factors.

13 Here, the duty was one owed to the profession, the conduct was intentional, and there
14 was actual injury to the disciplinary process. Respondent's actions harassed a probable cause
15 panelist and disrupted the proceedings in the Bernier matter. Respondent unnecessarily
16 protracted the instant proceedings. Respondent has demonstrated an inability or
17 unwillingness to abide the rules of professional responsibility. Absent a significant sanction,
18 Respondent's conduct will not be deterred.

19 I have considered the ABA Standards for Imposing Lawyer Sanctions. ABA
20 Standard § 6.22 provides that suspension is appropriate when a lawyer knowingly violates
21 a court order or rule, and there is injury or potential injury to a client or party, or interference
22 or potential interference with a legal proceeding. Here, there was interference with a legal
23 proceeding. Standard § 7.2 provides that suspension is appropriate when a lawyer knowingly
24 engages in conduct that is a violation of a duty owed as a professional, and causes injury or
25 potential injury to a client, the public, or the legal system. Here, Respondent violated his
26 duty to the tribunal and caused actual injury to the disciplinary system.

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Two cases are cited by the State Bar. In *Matter of Bemis*, 189 Ariz. 119, 938 P.2d 1120 (1997), an attorney was disciplined for, among other things, making numerous sarcastic comments about a judge in a paper filed with the court in violation of ER 8.4(d) (conduct prejudicial to the administration of justice). That attorney was also found to have attempted to engage in improper *ex parte* communications with a judge. Both kinds of misconduct were found to be negligent rather than knowing, and the attorney was censured and placed on probation for a year. Respondent's misconduct, however, was not confined to a single instance, as was the communication in *Bemis* and the Bar has not alleged improper *ex parte* communications with a judge. Additionally, Respondent's conduct was intentional.

In the case of *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983), a lawyer was suspended for a year for repeatedly making discourteous, insulting and degrading verbal attacks on a judge. *Vinsenti* involved behavior far more egregious than Respondent's.

DISCUSSION OF APPROPRIATE SANCTION

Suspension is the appropriate sanction for Respondent's conduct based upon Standards 6.22 and 7.2. As the Supreme Court stated in *Bemis, supra.* at 123, 1124, "Respondent must realize that zealous advocacy has limits. It clearly does not justify ethical breaches." (Internal citations omitted). Based upon a proportionality review, the A.B.A. Standards, and the weight of the aggravating and mitigating circumstances, it is recommended that Respondent's suspension be extended for an additional period of three months.

It is further recommended that Respondent be placed on probation for at least one year following reinstatement and be required to enroll in the Member Assistance Program (MAP) and meet with the MAP director prior to the effective date and develop a memorandum of understanding pursuant to the director's recommendation as a condition of reinstatement.

If it is further recommended that Respondent be assessed the costs of these disciplinary proceedings.

1 DATED this 20th day of September, 2006.

2 Martin Lieberman /cs
3 Martin Lieberman
Hearing Officer 7W

4 Original filed this 20th day
5 of September, 2006, and

6 Copies of the foregoing mailed
7 this 20th day of September, 2006, to:

8 George Vice, III
3915 E. Camelback Rd., #219
Phoenix, Arizona 85018

9 Don Peters
10 Miller LaSota & Peters PLC
722 E. Osborn Rd., Ste 100
Phoenix, Arizona 85014

11
12 By: Christina Seto